

## **II. Objection to the Drawings**

The drawings were objected to on the basis that the "lifting platform" recited in the claims is allegedly not illustrated in the drawings. The Examiner will note that enclosed herewith are proposed changes to Figure 2 to illustrate the lifting platform. No new matter has been added. In view of the foregoing, it is respectfully submitted that the present objection has been obviated, and withdrawal of this objection is respectfully requested.

## **III. Rejection of Claims 1 to 5 and 9 Under 35 U.S.C. § 102(b)**

Claims 1 to 5 and 9 were rejected under 35 U.S.C. §102(b) as anticipated by German Published Patent Application No. 39 16 048 ("Bassen"). Applicant respectfully submits that Bassen does not anticipate the present claims as amended herein for the following reasons.

Claim 1 relates to an operating device for a lifting platform. Claim 1 recites that the operating device includes a housing, the housing including a cover, and a plurality of operating elements. Claim 1 recites that each operating element is configured to operate the lifting platform to control a lifting and lowering of the lifting platform and that each operating element is disposed in the cover and formed as a foot switch. Claim 1 further recites that the housing is configured to be arranged in a sunken manner in a floor, the cover configured to be disposed at a level of the floor. Claim 1 has been amended herein without prejudice to recite that the lifting platform is configured to lift an entire motor vehicle. Support for this limitation may be found, for example, on page 1, lines 3 to 4 of the Specification.

The present invention relates to lifting platforms for motor vehicles, e.g., personal cars, trucks, etc., that are provided in repair shops, testing centers for motor vehicles, etc. These lifting platforms are provided to lift the vehicle by lifting rams and cross-members to allow inspection, maintenance and/or repair work at the substructure of the vehicles, e.g., at the axles, transmission, etc. In contrast, the references relied upon in the Office Action, as more fully set forth below, relate to so-called cargo lifting platforms, which differ substantially from vehicle lifting platform with regard to purpose and structure. In this regard, cargo lifting platforms are used for loading and unloading trucks. In an upright position, the cargo lifting platform forms a rear wall of the truck and can be swivelled into a horizontal position by hydraulically-actuated lever systems. Furthermore, the platform or rear wall in the

horizontal position can be hydraulically lowered from the loading level of the vehicle to the bottom level, as well as lifted. In the lowered horizontal position, goods, e.g., movable pallets, can be moved onto the platform. The platform is lifted to the level of the vehicle bottom so that the goods or the movable pallets can be pushed onto the loading area of the vehicle. It should be apparent that cargo lifting platforms are not arranged to lift the motor vehicle itself.

Bassen purports to relate to a vehicular lifting platform. The Office Action merely alleges that Bassen "discloses an operating device comprising a housing . . . configured to be arranged in a sunken manner in a floor, the housing includes a cover, a plurality of operating elements disposed in the cover and formed as a foot switch." Office Action at p. 3. Applicant respectfully disagrees and respectfully submits that Bassen does not disclose, or even suggest, all of the limitations of amended claim 1. As an initial matter, Applicant notes that only a translation of the abstract is provided. However, no translation of other sections of the disclosure of Bassen have been provided to Applicant. Bassen merely provides a cargo lifting device which is attached to a rear of a truck. The cargo lifting device is apparently actuated through foot switches (elements 120, 130). Applicant respectfully submits that Bassen does not describe, or even suggest, an arrangement in which a housing is configured to be arranged in a sunken manner in a floor, the cover configured to be disposed at a level of the floor, and in which the lifting platform is configured to lift an entire motor vehicle. Bassen only describes an arrangement configured to be mounted on a truck and to move light cargo, which is in stark contrast to an arrangement configured to move an entire motor vehicle. Furthermore, the contention that Bassen "discloses . . . a housing . . . configured to be arranged in a sunken manner in the floor" is simply unsupported by the disclosure of Bassen. As Bassen does not disclose, or even suggest, all of the limitations of amended claim 1, Applicant respectfully submits that the rejection of claim 1 should be withdrawn.

To anticipate a claim, each and every element as set forth in the claim must be found in a single prior art reference. Verdegaal Bros. v. Union Oil Co. of Calif., 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987). Furthermore, "[t]he identical invention must be shown in as complete detail as is contained in the . . . claim." Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). That is, the prior art must describe the elements

arranged as required by the claims. In re Bond, 910 F.2d 831, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990). As more fully set forth above, it is respectfully submitted that Bassen does not disclose, or even suggest, all of the limitations of claim 1 as amended herein. It is therefore respectfully submitted that Bassen does not anticipate amended claim 1.

Additionally, to reject a claim under 35 U.S.C. § 102, the Examiner must demonstrate that each and every claim limitation is contained in a single prior art reference. See, Scripps Clinic & Research Foundation v. Genentech, Inc., 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991). Still further, not only must each of the claim limitations be identically disclosed, an anticipatory reference must also enable a person having ordinary skill in the art to practice the claimed invention, namely the inventions of the rejected claims, as discussed above. See, Akzo, N.V. v. U.S.I.T.C., 1 U.S.P.Q.2d 1241, 1245 (Fed. Cir. 1986). In particular, it is respectfully submitted that, at least for the reasons discussed above, the reference relied upon would not enable a person having ordinary skill in the art to practice the inventions of the rejected claims, as discussed above. Also, to the extent that the Examiner is relying on the doctrine of inherency, the Examiner must provide a "basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristics necessarily flows from the teachings of the applied art." See M.P.E.P. § 2112; emphasis in original; and see, Ex parte Levy, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). Thus, the M.P.E.P. and the case law make clear that simply because a certain result or characteristic may occur in the prior art does not establish the inherency of that result or characteristic. Accordingly, the anticipation rejection as to the rejected claims must necessarily fail for the foregoing reasons.

In summary, it is respectfully submitted that Bassen does not anticipate amended claim 1.

As for claims 3 to 9, which ultimately depend from claim 1 and therefore include all of the limitations of claim 1, it is respectfully submitted that Bassen does not anticipate these dependent claims for at least the same reasons given above in support of the patentability of claim 1.

#### **IV. Rejection of Claims 1 to 9 Under 35 U.S.C. § 103(a)**

Claims 1 to 9 were rejected under 35 U.S.C. § 103(a) as unpatentable over German Published Patent Application No. 31 52 422 ("Kilgus et al.") in view of European Published Patent Application No. 0 960 770 ("Baer"). Applicant respectfully submits that the combination of Kilgus et al. and Baer does not render obvious the present claims as amended herein for the following reasons.

The Office Action alleges that Kilgus et al. "disclose[] an operating device comprising a plurality of housings . . . , configured to be arranged in a sunken manner in a floor 23, the housing including a cover 30, an operating elements [sic] disposed in the cover and formed as a foot switch, and the upper side of the cover is configured to be aligned with the level of the floor." Office Action at p. 3. Kilgus et al. are alleged to also disclose a separate housing for each operating element.

The Office Action alleges that Baer "discloses a foot operating device comprising a housing having a plurality of operating elements disposed in the cover and a display device for providing a display in accordance with predetermined operating states." Office Action at p. 3.

Applicant respectfully submits that the combination of Kilgus et al. and Baer does not disclose, or even suggest, all of the limitations of claims 1 and 3 to 9 as amended herein. In particular, it is respectfully submitted that Kilgus et al. do not disclose, or even suggest, an operating device for a lifting platform in which a housing is configured to be arranged in a sunken manner in a floor, the cover configured to be disposed at a level of the floor, and in which the lifting platform is configured to lift an entire motor vehicle. Kilgus et al. are limited to providing a cargo lift for installation on a rear of a truck. See Abstract and Figs. 1 and 2. Thus, Kilgus et al. fail to disclose, or even suggest, a housing configured to be arranged in a sunken manner in a floor or a platform configured to lift an entire motor vehicle as recited in amended claim 1.

Baer does not correct the defects of Kilgus et al. Baer merely describes allowing two foot switches (element 2) to be retrofitted on platforms which attach to truck lifts for aid in control. Baer does not disclose, or even suggest, an arrangement in which controls may operate a lift configured to lift an entire vehicle.

In rejecting a claim under 35 U.S.C. § 103(a), the Examiner bears the initial burden of presenting a prima facie case of obviousness. In re Rijckaert, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish prima

facie obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine reference teachings. In re Fine, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. In re Vaeck, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). Second, there must be a reasonable expectation of success. In re Merck & Co., Inc., 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim limitations. In re Royka, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974). As indicated above, the combination of Kilgus et al. and Baer does not disclose, or even suggest, all of the limitations of amended claim 1. It is therefore respectfully submitted that the combination of Kilgus et al. and Baer does not render obvious amended claim 1.

Moreover, it is respectfully submitted that the cases of In re Fine, supra, and In re Jones, 21 U.S.P.Q.2d 1941 (Fed. Cir. 1992), make plain that the Office Action's generalized assertions that it would have been obvious to modify or combine the references do not properly support a § 103 rejection. It is respectfully submitted that those cases make plain that the Office Action reflects a subjective "obvious to try" standard, and therefore does not reflect the proper evidence to support an obviousness rejection based on the references relied upon. In particular, the Court in the case of In re Fine stated that:

The PTO has the burden under section 103 to establish a *prima facie* case of obviousness. It can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. This it has not done. . . .

**Instead, the Examiner relies on hindsight in reaching his obviousness determination. . . . One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.**

In re Fine, 5 U.S.P.Q.2d at 1598 to 1600 (citations omitted; italics in original; emphasis added). Likewise, the Court in the case of In re Jones stated that:

Before the PTO may combine the disclosures of two or more prior art references in order to establish *prima facie* obviousness, there must be some suggestion for doing so,

found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. . . .

**Conspicuously missing from this record is any ~~vid nce~~, other than the PTO's ~~sp~~ ~~culation~~ (if it b ~~called~~ ~~vidence~~) that one of ordinary skill . . . would have been motivated to make the modifications . . . necessary to arrive at the claimed [invention].**

In re Jones, 21 U.S.P.Q.2d at 1943, 1944 (citations omitted; italics in original).

That is exactly the case here since it is believed and respectfully submitted that the present Office Action offers no evidence whatsoever, but only conclusory hindsight, reconstruction and speculation, which these cases have indicated does not constitute evidence that will support a proper obviousness finding. Unsupported assertions are not evidence as to why a person having ordinary skill in the art would be motivated to modify or combine references to provide the claimed subject matter of the claims to address the problems met thereby. Accordingly, the Office must provide proper evidence of a motivation for modifying or combining the references to provide the claimed subject matter.

More recently, the Federal Circuit in the case of In re Kotzab has made plain that even if a claim concerns a "technologically simple concept" -- which is not the case here -- there still must be some finding as to the "specific understanding or principle within the knowledge of a skilled artisan" that would motivate a person having no knowledge of the claimed subject matter to "make the combination in the manner claimed," stating that:

In this case, the Examiner and the Board fell into the hindsight trap. The idea of a single sensor controlling multiple valves, as opposed to multiple sensors controlling multiple valves, is a technologically simple concept. With this simple concept in mind, the Patent and Trademark Office found prior art statements that in the abstract appeared to suggest the claimed limitation. But, there was no finding as to the specific understanding or principle within the knowledge of a skilled artisan that would have motivated one with no knowledge of Kotzab's invention to make the combination in the manner claimed. In light of our holding of the absence of a motivation to combine the teachings in Evans, we conclude that the Board did not make out a proper prima facie case of obviousness in rejecting [the] claims . . . under 35 U.S.C. Section 103(a) over Evans.

In re Kotzab, 55 U.S.P.Q.2d 1313, 1318 (Fed. Cir. 2000) (emphasis added). Again, it is believed that there have been no such findings.

Accordingly, there is no evidence that the references relied upon, whether taken alone, combined or modified, would provide the features and benefits of amended claim 1. It is therefore respectfully submitted that amended claim 1 is allowable for these reasons.

Claims 3 to 9 ultimately depend from claim 1 and therefore include all of the limitations of claim 1. Applicant respectfully submits that claims 3 to 9 are patentable for at least the same reasons given above in support of the patentability of claim 1. In re Fine, supra (any dependent claim that depends from a non-obvious independent claim is non-obvious).

**V. Conclusion**

Attached hereto is a marked-up version of the changes made to the Specification and claims by the current Amendment. The attached pages are captioned "**Version with Markings to Show Changes Made.**"

It is therefore respectfully submitted that all pending claims are allowable. All issues raised by the Examiner having been addressed, an early and favorable action on the merits is earnestly solicited.

Respectfully submitted,

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**Version with Markings to Show Changes Made**

**IN THE SPECIFICATION:**

The paragraph beginning on page 5, line 21 has been amended as follows:

--In the area of the one transverse wall 4, two pressure switches 7 and 9 for lifting and lowering the lifting platform and arranged at a distance to each other and an emergency off switch 8 arranged between them are mounted. At a distance to the switches, a safety switch 10 is arranged in the area of the other transverse wall 4, which safety switch must be operated together with the corresponding pressure switch 7 or 9 for lifting or lowering the lifting platform 30. The distance between the pressure switches 7 and 9 for lifting and lowering and the safety switch 10 is selected so that they cannot be operated with one foot. For lifting and lowering the lifting platform 30, the pressure switch 7 or 9 and the safety switch 10 must be operated simultaneously with one foot, respectively. Thus, an unintended operation of the lifting platform is prevented. The emergency off switch 10 may also be arranged in the central area, as illustrated in Figs. 3 and 5. In addition, another foot switch 17 for activating a control voltage may be provided. The foot switch 17 is operated after an operation of the emergency off switch to re-establish the operable state. For preventing an unintended activation, the foot switch 17 may be disposed in a slightly sunken manner.--.

**IN THE CLAIMS:**

Claim 2 has been canceled without prejudice.

Claim 1 has been amended, without prejudice, as follows:

1. (Amended) An operating device for a lifting platform, comprising:  
a housing, the housing including:
  - a cover; and
  - a plurality of operating elements, each operating element being configured to operate the lifting platform to control a lifting and lowering

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of the lifting platform, each operating element disposed in the cover and formed as a foot switch;

wherein the housing is configured to be arranged in a sunken manner in a floor, the cover being configured to be disposed at a level of the floor; and

wherein the lifting platform is configured to lift an entire motor vehicle.